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No. 247

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court for the Middle District of Georgia

MOTION OF APPELLEE CARRIERS TO AFFIRM

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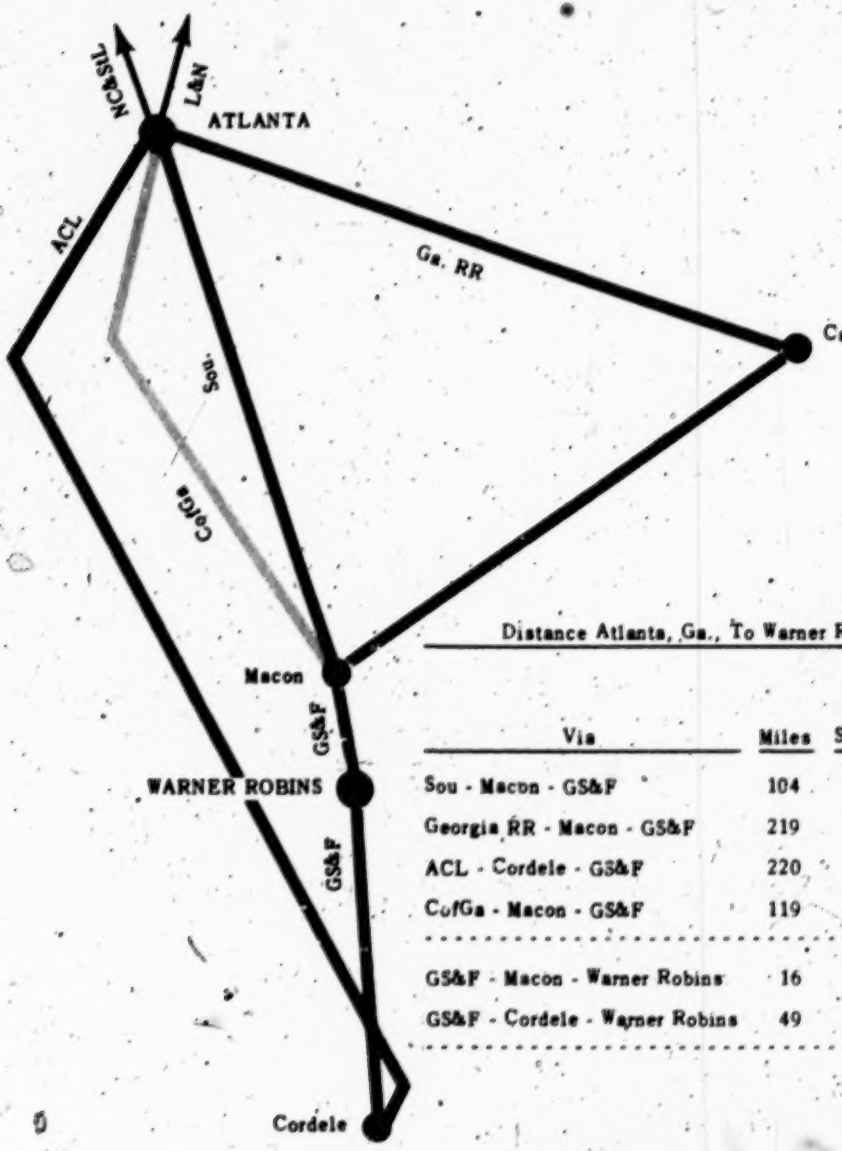

Distance Atlanta, Ga., To Warner Robins, Ga.

Via	Miles	Excess Over Sou-GS&F	Perce Of Circui
Sou - Macon - GS&F	104	-	-
Georgia RR - Macon - GS&F	219	115	110.6
ACL - Cordele - GS&F	220	116	111.5
CofGa - Macon - GS&F	119	15	14.4
GS&F - Macon - Warner Robins	16	-	-
GS&F - Cordele - Warner Robins	49	-	-

Southern-Georgia Sou. & Fla.
Georgia Railroad
Atlantic Coast Line
Central of Georgia

Source: Ex. No. 5

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MOTION OF APPELLEE CARRIERS TO AFFIRM

Pursuant to rule 16, paragraph 1 (c) of the Revised Rules of this Court, appellees Southern Railway Company and Georgia Southern and Florida Railway Company move that the judgment of the District Court be affirmed.

This is a direct appeal from the final judgment entered April 18, 1962, by a three-judge District Court convened under 28 U.S.C. 2284 and 2325, dismissing

appellants' complaint seeking to set aside an order of the Interstate Commerce Commission (by Division 2) entered on May 19, 1961, in *Routing, Coal from Origins on Louisville & N. R.*, 313 I.C.C. 752, which was affirmed by the entire Commission by order of May 19, 1961, denying petition for reconsideration. The jurisdictional statement was served on appellees on July 14, 1962.

QUESTIONS PRESENTED

The basic misconception and misunderstanding by appellants is in respect to the real issue in this case which, as the Commission pointed out, is "whether the *cancellation of routes* is consistent with the public interest" under section 15(3) of the Interstate Commerce Act. (313 I.C.C., p. 758) (Emphasis supplied) They endeavor to give the utterly unsupported impression that the cancellation involved is not of through routes but of joint rates, leaving through routes still in effect.

In the light of the argument made in the jurisdictional statement of appellants, the following questions are believed to be the ones here involved and that the correct answer to them shows that appellants' contentions are completely lacking in substance.

1. Was the Commission justified by the record in finding that there is "undue circuity" of the longer through routes including Georgia Railroad and Atlantic Coast Line Railroad (A.C.L.) between the points involved, as compared with the direct route including the Southern Railway Company and its wholly-owned subsidiary Georgia Southern and Florida Railway Company (G.S.&F.); that traffic "over those indirect routes" has been "relatively insignificant in terms both

of volume and of revenue"; that upon "all the evidence of record" the "cancellation of the routes here in question is consistent with the public interest"; and that "schedules under investigation" providing for such cancellation are "just and reasonable"?

2. Was it error for the Commission to treat as irrelevant and immaterial the question of reasonableness of alleged combinations of rates over such circuitous lines, when the through routes were found to have been properly cancelled, and there were thus no through routes for the movement of through traffic whether or not under combination rates?

3. Was the Commission justified in finding that there was no unlawful discrimination under section 3(4) of the Interstate Commerce Act?

4. Was there procedural error by the Commission in permitting, pending decision on further hearing, Southern to cancel the through routes including the Georgia R.R. and A. C. L. routes following the Court decision setting aside the Commission's first report and order finding that such cancellation had not been justified?

HISTORY OF THE CASE

This case involves the validity of a decision and order by the Commission (313 I.C.C. 752, J. S., p. 34) with respect to the elimination of wasteful and unnecessary bridge routes for the movement of coal from mines on the Louisville & Nashville Railroad Company (L. & N.) and on its subsidiary, Nashville, Chattanooga & St. Louis Railroad Company (N. C. & St. L.) later merged into it, to destinations on the G. S. & F., a part of the Southern System, the two roads last named being generally referred to herein as the Southern.

The coal traffic moved over the L. & N. and N. C. & St. L. from mines to Atlanta, Ga., and thence to destinations beyond, the principal destination being Warner Robins, Ga. The four routes and distances beyond Atlanta to Warner Robins are shown in the *chart* at the beginning of this motion and are as follows:

Route	Distance Beyond Atlanta (Miles)
1. L. & N. to Atlanta, Southern Railway to Macon, Ga., G. S. & F. (its subsidiary) to destination	104
2. L. & N. to Atlanta, Georgia R. R. to Macon, G. S. & F. to destination	219
3. L. & N. to Atlanta, A. C. L. to Cordele, Ga., G. S. & F. to destination	220
[1] 4. L. & N. to Atlanta, Central of Georgia (C. of Ga.) to Macon, G. S. & F. to destination	119

In each of the routes, Southern (which as noted includes the G. S. & F. as an integral part of its system) is the delivering line. Thus the Georgia R.R., the A. C. L., and the C. of Ga. are segments between the L. & N. at Atlanta and the Southern System as the terminating line. The routes are, therefore, referred to as bridge routes. It can be seen that the Georgia R.R. bridge route and the A. C. L. bridge route are each more than 100 miles longer, or more than twice as long as, the route over Southern beyond Atlanta.

The case before the Commission arose by reason of the suspension by the Commission of certain tariffs of Southern providing for the cancellation of the circuitous routes just described, including the Georgia R.R. and A. C. L. bridge routes. By its original tariffs filed to become effective December 26, 1955 and January 6,

[1] As later indicated the C. of Ga. bridge route is not here in issue, not having been cancelled.

1956, Southern provided for routes from the L. & N. mines and the N. C. & St. L. (now L. & N.) mines to points on the G. S. & F. but limited only to the Southern direct route beyond Atlanta. This was accomplished by omitting reference to routes previously published to include the Georgia Railroad, the A. C. L. and the C. of Ga. Exhibits 3 and 4 showed the then-existing "Present routes" and "Proposed routes" to the destination points involved and the word "Cancel" as to each of the routes except the route via Southern. Also the tariff in each instance provided that "routes formerly shown and not brought forward are hereby cancelled".[2]

These schedules proposing to eliminate the bridge routes of the Georgia R.R., the A. C. L., and the C. of Ga., were suspended by the Commission prior to their effective dates in Investigation and Suspension docket No. 6538.

After a hearing, the examiner who heard the case concluded that the proposed schedules had been justified. However, on exceptions and replies, Division 2 of the Commission, on March 19, 1957, concluded (309 I.C.C. at p. 131; J. S. App. p. 32) that "we are not satisfied that the respondents [Southern] have met the burden resting upon them of showing that the *cancellation of the bridge routes* proposed would be consistent with the public interest" and that "the proposed cancellation of *joint rates and routes* is not shown to be just and reasonable". Commissioner Freas, dissenting, stated that in his opinion "respondents have justified

[2] See Note C3 in supplement 6, page 3, to S.F.T.B. tariff I.C.C. 1429 (Ex. 34) and Note C6 in supplement 18, pages 2 and 3 to S.F.T.B. tariff I.C.C. 1427 (Ex. 33).

cancellation of all the routes involved". (Emphasis supplied) Petition for reconsideration was later denied.

Thereafter, Southern filed its complaint in the United States District Court for the Middle District of Georgia seeking to set aside the Commission's decision and order. The court, by its decision of September 22, 1958, concluded "that on the present record and findings the Commission could not legally conclude that the plaintiff had not carried its burden of showing that the *elimination of routes* (2) and (4) is consistent with the public interest" and that the order of the Commission "is set aside and the case is remanded to the Commission for further proceedings in conformity with this opinion". (Emphasis supplied) *Southern Railway Company* v. *United States*, 167 F. Supp. 747, 755. The court had previously pointed out that there were various considerations which the Commission "might properly weigh to counteract the prima facie case made by the plaintiff" and that the burden of proof rested with the plaintiffs. No appeal was taken from the decision of the Court. (id. p. 754).

Following the Court's decision, the protestant carriers filed a petition seeking to have the case reopened and a further hearing held. This petition was granted by order of March 23, 1959 but only as to "routes embracing the Atlantic Coast Line Railroad and the Georgia Railroad beyond Atlanta", the C. of Ga. bridge route being excluded (J. S. App. p. 47). No objection was made to such exclusion.

In the same order (March 23, 1959) the Commission modified its previous order which had required cancellation of the routes in question "by vacating and setting aside the requirements that respondents cancel the

proposed cancellation of routes embracing" the A. C. L. and Georgia R.R., "pending decision of the Commission on further hearing in the proceeding", but no modification was made as to "the proposed cancellation of route over the Central of Georgia Railway Company beyond Atlanta" (J. S. App. pp. 46, 47).

Thereafter, by tariffs filed with the Commission to become effective July 13, 1959, Southern cancelled the Georgia R.R. route and the A. C. L. route. Exhibit 46 showed the existing routes on July 12, 1959, via these two protestant lines and that "effective July 13, 1959", "no change" was made as to the route via the Southern but as to the Georgia R.R. and A. C. L. routes the requirement was "Cancel".[3] Thus it was made plain that routes previously in effect via the Georgia R.R. and the A. C. L. were cancelled and eliminated. The tariffs themselves contain a note that routes not brought forward "are hereby cancelled".[4]

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[3] The exhibit lists the tariffs showing these facts, namely, SFTB I.C.C. S-62 and Supplement 82 to I.C.C. 1499 as to traffic from L. & N. mines and SFTB I.C.C. S-62 and Supplement 78 to I.C.C. 1427 as to traffic from L. & N. (N. C. & St. L.) mines (R. 247, 248).

[4] The explanatory note, for example, in Supplement 82, page 4, reads:

> "Routes formerly shown and not brought forward herein, are hereby cancelled. Note 1—This has the effect of establishing matter which was suspended by order of the Interstate Commerce Commission in I&S Docket 6538, voluntarily postponed and cancelled pursuant to order in that proceeding dated August 23, 1957, which order was vacated by order dated March 23, 1959, the 7 months period of suspension having expired August 5, 1956."

Appellants in a remarkable emotional outburst (J. S. pp. 19, 20), itself indicative of weakness, seek to criticize Southern for presenting the actual tariffs in court, although appellants con-

The Commission declined to suspend the new tariffs providing for cancellation of the Georgia R.R. and A. C. L. routes but in docket No. 33128 entered an order on July 10, 1959, instituting an investigation concerning the lawfulness of the tariff schedules involved (J. S. App. p. 48).

Since the schedules were not suspended, they became effective on July 13, 1959, and since then the A. C. L. and Georgia R.R. *routes* have been cancelled.

A further hearing was held in the two dockets on November 30 and December 1, 1959, before a hearing examiner who recommended that cancellation of the two bridge routes here in question (via the A. C. L. and via the Georgia R.R.) should be found to be justified.

Thereafter, Division 2 of the Commission by its report and order of May 19, 1961, here under attack (313 I.C.C. 752, J. S. App. p. 34), found and concluded that "the cancellation of the *routes* here in question is consistent with the public interest" and that the schedules under investigation are "just and reasonable". (Emphasis supplied) The order discontinued the proceedings. A petition for reconsideration by the entire Commission was filed by the protestants but was denied by order of September 13, 1961. Thereafter, the appellant carriers filed a suit in the same court to set aside

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seuted thereto and even though they must be presumed to know these tariffs, having relied upon them in Exhibit 46, and must know that tariffs, when suspended or investigated, are not introduced in evidence before the Commission, but are matters of official and judicial notice. Appellants' excitement may stem from the fact that the tariffs themselves are further confirmatory of the testimony and exhibits puncturing appellants' erroneous theory that the tariffs cancelled *joint rates* and not *through routes*, and thus left through routes in effect.

the Commission's report and order of May 19, 1961, and the order of September 13, 1961, denying the petition for reconsideration.

This was a separate suit and was not a continuation of the original case brought before the Court. After briefs and oral argument, and consideration of contentions of all the parties, the Court upheld the Commission's report and order. It concluded, among other things, that the findings of the Commission "that *cancellation of routes* here was consistent with the public interest, and that the schedules effecting the cancellations were just and reasonable" were "based on substantial evidence from the record as a whole and that the conclusions of justness, reasonableness and consistency with the public interest are warranted in fact and in law" (J. S. App. pp. 18, 19). (Emphasis supplied) The Court further held with respect to appellants' contentions concerning the question of reasonableness of rates under section 15(7) of the act that the "routes were closed and no question was left as to rates. Southern no longer held itself out as offering through transportation service on coal over these routes" (id. p. 20).

The Court further held that "on remand it was proper for the Commission to vacate its prior order cancelling the closing of the Coast Line and Georgia Railroad routes by Southern" and that "the status quo did not require continuing the order of cancellation in effect in view of the decision of that court that Southern had established a prima facie case" (id. p. 20). The Court also held that unlawful discrimination under section 3(4) of the act had not been shown and that the Commission was fully warranted in reaching its conclusion (id. p. 21).

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The history of the case, it is believed, shows that appellants have had full opportunity to be heard, that their contentions have been carefully considered and found to be without merit, and that the Commission's decision here involved is clearly valid.[5]

THE QUESTIONS RAISED BY APPELLANTS ARE WITHOUT SUBSTANCE

Rule 16 of the rules of this Court provides for receiving "a motion to affirm the judgment" of a lower court "on the grounds that it is manifest that the questions on which the decision of the court depends are so unsubstantial as not to need further argument".

Appellees believe that the questions raised by appellants do not involve broad and important rulings of law but in substance merely whether the Commission has properly exercised its discretion on the basis of necessary findings and on substantial evidence; that appellants' contentions are wholly lacking in merit, and that there is such utter lack of substantiality in the questions raised by them that no need for further argument is shown to exist.

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[5] It is to be noted that cancellation of routes proposed by Southern and later effected has been found proper by two hearing examiners, by Division 2 of the Commission, by the Commission itself on petition for reconsideration, and by unanimous decisions of two three-judge courts, with five different judges (Judges Tuttle, Davis and Bootle, on the first Court, and Judges Bell, Bootle and Morgan, on the second).

1. The Commission's Findings That "The Cancellation of the Routes Here in Question Is Consistent With the Public Interest" and That the Schedules Providing for Such Cancellation Are "Just and Reasonable" Are Clearly Supported by the Record and Are Valid

From the very beginning of this case it was made manifest that the "cancellation of routes" was the real issue. The first witness to testify at the first hearing showed that Investigation and Suspension Docket No. 6538 "involves the *elimination* of so-called 'bridge routes' in connection with rates on coal from origins on the L&N and the NC&StL to stations on the GS&F", that the routes to be *eliminated* are those including the Georgia R.R. and the A. C. L., and that "it is proposed to continue the route of the Southern Railway Company" and the G. S. & F. beyond Atlanta "as this is a single system line route" (Witness Goodman, R. 8, 9; emphasis supplied). Further indicating that the purpose was to eliminate the routes as distinguished from merely cancelling rates, he pointed out Southern's interest in doing what it could to reduce expenses and improve efficiency and that "the so-called 'bridge routes' were eliminated so that this coal traffic would be channeled via the most direct, economical and efficient route", namely, the Southern route, as contrasted with the indirect and circuitous routes sought to be eliminated (R. 10, 11).

Finding of "undue circuity" over cancelled routes. Appellants seek to find fault with the Commission's finding of "undue circuity" (which is tantamount to a finding of wastefulness) of the routes including the Georgia R.R. and the A. C. L., and unjustly assert that "the Commission merely quoted the comments of the Court [its decision in 167 F. Supp. 747] on the circuity aspect of the public interest issue * * *" (J. S. p. 30).

While the Commission referred to the Court's decision, it is entirely plain from the Commission's findings that the "prima facie" case which the Court referred to was one which would not be controlling if "countervailing considerations" might be found to exist, and the Commission in its painstaking review of the evidence clearly showed that it considered all relevant facts and that Southern had in fact sustained the burden of proof resting upon it.[6]

The Commission in showing undue circuity of the Georgia R.R. and A. C. L. routes to be eliminated, pointed out the mileages "to the principal destination of the coal traffic affected by the routing restrictions, Warner Robins, Ga., the location of an Air Force base", the distances from Atlanta being only 104 miles over the Southern, 219 miles over the Georgia R.R., and 220 miles over the A. C. L. which involved a "movement of 48.5 miles in the nature of a backhaul". (J. S. App. p. 36). It thus showed that over the Georgia R.R. route beyond Atlanta the haul would be 115 miles longer than over the Southern route, and that the A. C. L. route would be 116 miles longer than over the Southern route, or in both cases the routes would be more than twice as long as the Southern route. The Commission also showed that it was not bound by consideration of circuity under the long-and-short-haul clause of section 4 of the act which had been amended since the Commission's first report (J. S. App. p. 41).

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[6] The question raised by appellants as to the effect of not appealing the lower court's decision is immaterial in view of the *de novo* consideration the Commission gave to the entire record, and insofar as rulings of law might be considered, appellants are in any event bound by their failure to appeal.

The fact as to extra hauls of more than 100 miles each over th two routes to be eliminated within itself evidences wasteful operation.

As showing the wasteful character of the two eliminated routes here involved because of the undue circuity thereof, an experienced operating official of Southern testified that "from a transportation standpoint * * * it would be much more economical to handle them [the coal cars] over the Southern-GS&F route", which "is 104 miles" to Warner Robins, "while the distance * * * is approximately 220 over the Coast Line route". "In that distance to handle the car, you would have that much more maintenance on the car, you would have that much more maintenance on your tracks, you would use more diesel oil, use more diesel power. Your train crew hire on a railroad is based on 8 hours work or 100 miles. In other words 100 miles in freight train service on a railroad is equivalent to a day's work, and, when you go 220 miles as against 104, you are paying for 2.2 days as against 1.04 days on the Southern-GS&F route" (R. 490). This is clearly true also as to the Georgia R.R. route.

This witness also showed that part of the service over the Georgia R.R. is by a *local* train beyond Camak, Ga. to Macon (R. 390) and that there is evidence of interference and delay in the switching to Southern at that point (R. 495). Moreover, appellants fail to mention the fact that traffic moves in heavier trains over the Southern route as compared with the A. C. L. route and the service is thus more economical; also that Southern's route is a favorable one as compared with the Georgia R.R. route which has only local train service over part of that railroad. The Commission points out the facts as to the heavier trains over the

Southern route and the local train service between Camak and Macon of approximately 78 miles over the Georgia R.R. route (J. S. App. p. 40; R. 408, Ex. 65; R. 488, Ex. 66).[7]

In considering whether, as the Commission has found, it is consistent with the public interest to cancel the Georgia R.R. and A. C. L. routes, it is to be noted that the National Transportation Policy (49 U.S.C.—note preceding section 1) is that the Interstate Commerce Act is to be "so administered as * * * to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation * * *" and that "the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy". (J. S. App. p. 50)

The record shows that Southern has recognized that railroads in the severe competitive conditions confronting them must adapt and readjust their equipment, facilities and services to provide the most economical and efficient operation possible. To this end Southern has spent large sums in modernization and mechanization and has accomplished relatively better and more

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[7] Appellants seek to give the impression of more favorable operating conditions in handling coal over the A. C. L. bridge route to Warner Robins. The evidence clearly shows that there is a back haul in the loaded movement from Cordele to Warner Robins; that even if an A. C. L. car should arrive earlier than a car over the Southern route, there would be no actual saving of time because both cars would go into the plant at the same time (R. 508); and that more car days would be required over the A. C. L. route, because empty cars brought in over the A. C. L. route would have to be sent back over the same route through Cordele as contrasted with the direct movement of empty cars from Warner Robins over the Southern route to Atlanta and beyond to the coal mines (R. 489, 493, 508).

economical and efficient service than the other carriers here involved (R. 57, 58-62, Exs. 23, 24).

This Court pointed out in *New York Central Corp.* v. *United States*, 287 U.S. 12, 25 (1932), an acquisition proceeding under section 5(2) of the act that "* * * the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities * * *." See also *Schwabacher* v. *United States*, 334 U.S. 182, 194 (1948) and *Delaware, L. & W. R. Co. Trackage Rights*, 295 I.C.C. 743, 756 (1958).

The lower court in its decision in 167 F. Supp. at p. 754, referred to the National Transportation Policy as showing the intent of Congress "to have the Commission give serious attention to the matter of providing economical transportation" and referred in this connection to "the subcommittee report which is part of the legislative history of this [1958] amendment to the Interstate Commerce Act" stating that the "railroad industry has not, in the subcommittee's opinion been sufficiently interested in self help in such matters as * * * *abolishing of unnecessarily circuitous routes for freight movements*" (emphasis supplied).

The finding of the Commission of "undue circuity" over the eliminated routes is not only clearly supported by "substantial evidence" which is all that is required (*Universal Camera Corp.* v. *National Labor Rel. Bd.*, 340 U.S. 474, 488) but is supported by the overwhelming weight of the evidence and is in accord with the terms of the Act and the National Transportation Policy. The lower court properly upheld the Commis-

sion's finding as to the "unduly circuitous" character of the eliminated routes (J. S. App. pp. 18, 19).

Finding of "relatively insignificant" movement of traffic over the Georgia R.R. and A. C. L. routes before cancellation thereof. Appellants do not attack directly the finding as to the relatively insignificant traffic moving over the Georgia R.R. and A. C. L. routes before they were cancelled, but indirectly attack this finding in claiming that operations over those routes were profitable and that the elimination of the routes "will result in a diminution of service both on this and other traffic moving via Coast Line and the Georgia Railroad" (J. S. p. 31).

The Commission in its report shows the number of carloads of coal which moved over the Georgia R.R., A. C. L. and Southern routes in 1955, 1958, and in 1959 prior to the cancellation of the first two routes on July 13, 1959. It properly found that these shipments amounted to only about "*3 cars per week*" over each of the two routes to be eliminated. (Emphasis supplied) This is equivalent to an average of less than one-half a car per day. On the other hand the great bulk of the traffic is shown to move over the Southern route (J. S. App. p. 37; see also Ex. 64, R. 43, 455).

There is no showing that since the routes were closed there has been any attempt by any shipper to move any coal over these closed routes.

Appellants seek to show that the operation prior to closing of the Georgia R.R. and A. C. L. routes was profitable. There is no requirement under the statute, that such a showing be made. However, the Commission finds that appellants' claim is not sustained, after comparing the average coal revenue per car mile of

the coal traffic involved with system average operating expense per car mile which shows as to Southern that the revenue exceeds the average operating expense, while the reverse is true as to the Georgia R.R. and A. C. L. (R. 521, 522). Moreover, as the Commission points out, the operating expenses do not include such important items as "payroll and other taxes, equipment and joint-facility rents, and return on investment" (J. S. App. p. 41). While the Commission said that "the data have the deficiencies of system averages", it said the "indicated non-profitability of the traffic to the protestants is not rebutted by better evidence" (id.)[8]

Appellants' attempt to bolster their claim of profitable operation by reference to average per-car revenues (J. S. p. 32) is on an utterly unsound basis because merely revenue comparisons are of no significance in showing costs. Moreover, appellants' contention that cancellation of the routes would "lead to diminution of service" is fatally weak. The contention in the record was that cancellation would cause a reduction of daily service to a tri-weekly service over the Georgia

[8] Certainly in the light of the excess distances involved and the wasteful character of such circuitous routes over the Georgia R.R. and the A.C.L., as compared with the Southern route, the burden shifted to the appellants to offset the cost comparison and they had every opportunity to do so. In *Chesapeake & O. Ry.* v. *United States*, 11 F. Supp. 588, 593 (affirmed 296 U.S. 635), it was held that while the complainant shipper had the burden of showing that the railroad rates attacked were unlawful, the evidence was ample, "especially in view of the fact that if the operating conditions were not equal, the evidence necessary to establish that fact lay peculiarly within the knowledge of the railroad". See also *Eastern Bituminous Coal Assn.* v. *Baltimore & O. R. Co.*, 299 I.C.C. 691, 722, and *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1938).

K.R. This is on its face absurd when only an average of less than one-half car a day is involved. The claim also was made that a reduction to tri-weekly service had been made necessary but the record showed that the reduction occurred more than a year prior to the closing of the route and therefore had no relation to the closing (R. 391, 393).

Findings as to shipper testimony. Appellants contend that "shippers and receivers appeared in opposition of these schedules *at each and every hearing* before the Interstate Commerce Commission * * *" (J. S. p. 13; emphasis supplied). This is a distortion of the facts.

The Commission's report shows that only two shipper witnesses appeared at the original hearing, that neither appeared at the further hearing and thus made no attempt to repair the defects in their testimony, that only *one* other shipper witness appeared at the further hearing and his testimony was even weaker than that of the first two witnesses.

The Commission's report shows that it carefully considered and made findings as to the shipper testimony and that the infirmities in such testimony were such as to be no obstacle to finding that the routes in question should be eliminated.[9]

The Commission showed as to the two witnesses at the first hearing that most of the coal traffic had moved over the direct Southern route, that the service had been adequate and satisfactory, that they weakly con-

[9] There is "no real demand" or any "real interest" by shippers for the two circuitous routes here involved. Such lack of interest has been held significant in *Newsprint Paper Via Cheyenne, Wyo. and Denver, Colo.*, 309 I.C.C. 343, 346; *Restrictions in Routing over S. L. & U. R. R.*, 115 I.C.C. 357, 369, and 122 I.C.C. 208, 211.

tended that "they preferred to have all routes kept open * * *", and that they were concerned with emergency conditions as to which the Commission could adequately deal by special orders under section 15(4) of the Act.

As to the only witness testifying at the further hearing, the Commission found that he "expressed a *desire* for continuance of the routes in question, particularly that in connection with the Georgia Railroad". (313 I.C.C. pp. 755-756; J. S. App. p. 39) (Emphasis supplied) This witness, however, expressed interest in only the Georgia R.R. route and falteringly said "I believe there was one car that went that way this year [1959]. I wouldn't want to swear to that, though" (R. 435). He admitted that the coal received by his plant moved over Southern and the C. of Ga. and that no coal was received over the Georgia R.R. in 1957 and 1958 (R. 434). He gave no indication that any coal had ever been received over that route in prior years. The weak representations made by the three shipper witnesses amounted to no more than an indefinite expression of "desire" and formed no substantial basis for disapproving the elimination of the two routes here involved.[10]

[10] The Commission has long recognized that "the mere desire of supporting shippers" for a proposed service under the convenience and necessity provisions of the act is insufficient "to warrant a grant of the requested authority" (*Juan De La Cruz Guerra Common Carrier Application*, 49 M.C.C. 657, 660) and that industries desire the service of as many carriers as possible "regardless of the precepts of Congress embodied in its National Transportation Policy" (*Nashville, C. & St. L. Ry. Construction*, 295 I.C.C. 363, 378, order upheld 156 F. Supp. 711, affirmed 356 U.S. 273, April 14, 1958). Moreover, the effect to be given such testimony was clearly within the Commission's discretion (*United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535, 536 (1946)).

The evidence as a whole, and the Commission's findings, clearly showed that the Commission was fully justified in concluding that the cancellation of the two routes here involved was consistent with the public interest and that the tariff schedules providing for cancellation of these routes, together with the joint rates thereover, are just and reasonable.

2. Cancellation of the Two Through Routes Here Involved Having Been Found Proper, the Question of Rates for Through Service Over These Routes Is Irrelevant

Appellants misconceive and misrepresent the actual fact that the tariffs under consideration provide for cancellation and elimination of the *through routes* via the Georgia R.R. and the A. C. L. bridge lines, and that with no through routes in existence there could not be combination or other rates over routes thus eliminated and making impossible the movement of through traffic thereover.

Appellants seek to rely upon language in the first decision by the lower court in *Southern Railway Company* v. *United States*, 167 F. Supp. 747, 750 (J. S. pp. 20, 33) to support their view that joint rates, not through routes, are cancelled. The quotations, however, are out of context and the Court unmistakably showed that it was concerned with *cancellation* of the two *bridge routes* in stating (p. 754):

> "We think, therefore, that on this affirmative showing the Southern clearly carried the initial burden of proving that the *cancellation of the two bridge routes* (2) [via Georgia R.R.] and (4) [via the A. C. L.] was just and reasonable and consistent with the public interest". (Emphasis supplied)

And the ultimate conclusion of the court (p. 755):

> "We do conclude that on the present record and findings the Commission could not legally conclude that the plaintiff had not carried its burden of showing that the *elimination of routes* (2) and (4) is consistent with the public interest". (Emphasis supplied)

Appellants in their Jurisdictional Statement repeatedly assert their unfounded claim that cancellation of rates, not of routes, is involved. They contend, for example, "that under the factual situation in this case there are still in existence *through routes* via the Coast Line and Georgia Railroad even under the schedules involved since the only change is that unreasonably higher rates would be applied over those routes than over others as a result of Southern's action herein" (J. S. p. 22; for other examples see each of pages 6-15).[11]

The Commission's report here under attack makes the finding previously referred to that "we conclude that the *cancellation of the routes* here in question is consistent with the public interest" (313 I.C.C. p. 758; J. S. App. p. 43; emphasis supplied). Earlier in the report it referred to the fact that from July 13, 1959, the Georgia R.R. and A. C. L. "routes were closed" (313 I.C.C. p. 754; J. S. App. p. 38). It also referred to operation on the Georgia R.R. route "before the closing of its route on coal in July 1959" (313 I.C.C.

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[11] In spite of testimony, as pointed out above, of the Southern witness at the very beginning of this case that the purpose of Southern and the effect of the tariffs, as shown by his exhibits, were to cancel and thus eliminate the through routes including the Georgia R.R. and the A. C. L. (R. 10, 11; Exhs. 3, 4), appellants contend that the Southern witness "stated that the elimination of *joint rates* via the routes in question was a part of an overall program" etc. (J. S. pp. 12, 13; emphasis supplied).

p. 756; J. S. App. p. 40) and stated "The issue here is whether the *cancellation of routes* is consistent with the public interest" (313 I.C.C. p. 758; J. S. App. p. 42; emphasis supplied).

Appellants' contention that through routes are not eliminated via the Georgia R.R. and the A. C. L. bridge lines but that higher combination rates are applicable over those routes is utterly fallacious in view of the fact that the schedules clearly cancelled the *through routes* and did not publish increased rates over those cancelled routes. While in eliminating the through routes the joint rates which previously applied thereover were also eliminated, no rates are applicable over those routes in *through service* from mine to destination. If a shipment moved over one of these cancelled routes, it would have to be as two or more separate local movements pursuant to separate bills of lading and each having separate origin and terminal services, through movement being prohibited. Local rates would be applicable and these rates are already in existence and are not in any sense increased as a result of the cancellation here involved. Moreover, the Commission's order of investigation of July 10, 1952, in docket No. 33128 is into and concerning the lawfulness of the schedules which published the cancellation of routes and the joint rates applicable thereover and named no combination rates.

Appellants' claim that the Commission had the duty to pass upon the reasonableness of combination rates covering separate local movements over non-existent through routes is nothing short of absurd and if accepted, would make a mockery of the provisions of section 15(3) of the act.

In *Thompson* v. *United States*, 343 U.S. 549 (1952), which appellants misconstrue, the Court said:

"In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering *through* transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service" (p. 557, emphasis supplied).

The Court further said:

"The Commission continues to support its order, but the logical conclusion of the theory advanced by the Commission is that through routes exist between all points throughout the country wherever physical rail connections are available. If there is no *through carriage* over any combination of connecting carriers, the Commission under its present theory would never have to establish through routes under Section 15(3) and (4) but could divert traffic to any route between two points *by ordering reduction of the sum of the local rates over that route.* Acceptance of this argument would mean that Congress' insistence on protecting carriers from being required to short haul themselves could be evaded whenever the Commission chose to alter the form of its order" (p. 559, emphasis supplied).

The through routes in the present case being cancelled, there was no holding out to move through coal traffic, no solicitation of such traffic, and no movement thereof over the lines formerly constituting the through routes.[12]

[12] Witness Martin of Georgia R.R. admitted (R. 249) that "insofar as the shippers are concerned, the tariffs will indicate a complete absence of Georgia Railroad route; and it is certainly unlikely that any shipper or receiver would select a route other than specifically provided in the tariff". See also testimony of L. & N. witness Kuebert who objected to "cutting out these routes" (R. 203).

The question as to reasonableness of through rates, whether by a combination or otherwise, over routes which have been closed is beyond the issues in this case and is irrelevant. The Commission, in referring to the contention made by protestants as to the necessity of considering "higher combination rates" pointed out that "The issue here is whether the cancellation of routes is consistent with the public interest" (313 I.C.C. 758; J. S. App. p. 42). It thus showed that protestants' claim was irrelevant and certainly no further findings were necessary in respect to this immaterial issue.

The Interstate Commerce Act does not require findings as to "collateral or immaterial" contentions (*Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173, 193, 194) and "does not require the Commission to make detailed findings of fact" but it need only show "the essential basis of its judgment" *Alabama Great Southern R. Co.* v. *United States*, 340 U.S. 216, 227, 228 (1951). This the Commission has done in the present case.[18]

The lower court in aptly disposing of the contentions as to rates, said, among other things (J. S. App. p. 20):

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[18] If the Commission could pass upon a combination of local rates applicable only to local traffic between points on a through route, when the through route has in fact been closed as in the present case, it could proceed to reduce the sum of the local rates to the level of the rate over the open routes and thus utterly destroy any attempt under the act to close through routes. This appellants overlook in discussing the *Thompson case*, 343 U.S. 549, and in citing *Cancellation of Routing, Paper, Gainesville M. R. Co.*, 306 I.C.C. 515, 520, and *Southern Ry. Co.* v. *United States*, 153 F. Supp. 57, referred to therein (J. S., p. 19). In the latter two cases the through routes had not been cancelled but were in existence and therefore the question of reasonableness of rates thereover could be dealt with.

"The routes were closed and no question was left as to rates. Southern no longer held itself out as offering through transportation service on coal over these routes." *Thompson* v. *United States*, 1952, 343 U. S. 549, 557. That shipments could continue to move over the same route on local bills of lading at the higher combination rates would not suffice to convert the sum of the routes into through routes."

Appellants' contentions as to rates is repugnant to common sense and completely without merit.

3. The Commission Properly Found That There Was No Unlawful Discrimination Under Section 3(4) of the Interstate Commerce Act

Appellants weakly seek to attack the Commission's finding of no unlawful discrimination. The Commission made plain its reasons for such finding and it is clear that they are reasonable and sound.

The "undue circuity", and therefore wasteful character, of the two cancelled through routes including the Georgia R.R. and the A. C. L. was found by the Commission, while no "undue circuity" was found as to the route including the C. of Ga., which closely approximated the mileage over the direct Southern route and continued to be open with the same joint rates as over the Southern route. The conditions were, therefore, fundamentally different as between the two unduly circuitous and wasteful routes and the nearly direct route including the C. of Ga. The Commission was clearly justified by its findings and the evidence in concluding that the Southern in not opening the two closed routes and providing for rates over those routes on the same level as over the route including the C. of Ga. was not unlawful discrimination under section 3(4)

of the act. To have held otherwise would have amounted to emasculating the provisions of section 15(3) and unmercifully distorting the provisions of section 3(4) of the act.

The Commission said that "Section 3(4) requires equality of treatment between connecting lines, but equality of treatment is determined by similarity of circumstances and conditions", citing cases, but that "the distance from Atlanta to Warner Robins over the Central of Georgia is only about 15 miles longer than over the Southern's direct route, in contrast with 115 and 116 miles longer over the Georgia Railroad and the Coast Line, respectively, a fact which negatives any conclusion that the transportation conditions are similar". As noted, the Commission also found "undue circuity" of the Georgia R.R. and A. C. L. routes (313 I.C.C. p. 758, J. S. App. pp. 42, 43).[14]

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[14] The lower court in overruling the contention that unlawful discrimination had not been properly found, said (J. S. App., p. 21):

> "Plaintiffs make the novel point that Southern discriminates against the Georgia Railroad by accepting traffic from Central of Georgia at Macon on the basis of through route joint rates in violation of the Section 3(4) of the Act, 49 USCA 3(4). They contend that the point of discrimination is upon delivery in Macon and that to avoid discrimination Southern must perform the same service at the same rate for all cars delivered to Macon by any carrier. To adopt this theory would be to eliminate consideration of the route itself and the factors relating thereto such as circuity and waste from consideration in a route closing case. We are not here concerned with switching or terminal services. Cf. *Louisville & Nashville Railroad Company* v. *United States*, 1915, 238 U.S. 1. Section 3(4) requires equality of treatment between connecting lines but equality of treatment involves comparable conditions and the route of the Georgia being closed does not compare with that of Southern or the Central of Georgia."

The switching cases relied upon by appellants are clearly inapposite and are properly so held by the Court. It is manifest from the Court's decision that the assertion by appellants that it made findings *de novo* to rescue the Commission's orders is unfair and absurd. Also, appellants, in quoting from *Louisville & N. R. Co. Merger*, 295 I.C.C. 457, 486, to the effect that there must be "maintenance of all existing joint routes", failed to quote the language that "conditions are set out in the appendix" and the significant reservation made therein that the requirement as to maintenance of joint routes would apply "unless and until otherwise authorized by us" (p. 506). That case, therefore furnishes no support for appellants' position.

4. There Was No Procedural Error by the Commission in Permitting, By Its Order of March 23, 1959, Southern to Cancel the Two Through Routes in Question Pending Decision on Further Hearing After Its First Report and Order Had Been Set Aside

Appellants make a contention as to an alleged procedural error which is on its face nothing more than an empty legalistic technicality. The claim, in substance, is that the Commission erred by its order of March 23, 1959, in providing for a modification of its order of March 19, 1957, which required cancellation of Southern schedules under suspension in Investigation and Suspension docket No. 6538, the modification being the "vacating and setting aside the requirements that respondents cancel the proposed cancellation of routes embracing the Atlantic Coast Line Railroad Company and the * * * Georgia Railroad * * * pending decision of the Commission on further hearing in this proceeding", and leaving in force the route over the C. of Ga. beyond Atlanta.

Appellants erroneously fail to recognize that in the first court decision (167 F. Supp. 745, 755) the Court said "The order of the Commission is *set aside* and the case is remanded to the Commission for further proceedings in conformity with this opinion" (Emphasis supplied).

Since the order of March 19, 1957, was set aside, with the legal conclusion by the Court that it was invalid as to the through routes including the Georgia R.R. and the A. C. L. bridge lines, it was entirely proper for the Commission to vacate that order insofar as it required cancellation of the tariffs eliminating those routes. The Commission in not suspending the later tariffs providing for cancellation of the two routes mentioned was not governed by the findings in its original decision and expressly provided in its order of March 23, 1959, for further hearing. These later tariffs (Supplement 82 to S.F.T.B. tariff I.C.C. 1499 and Supplement 78 to S.F.T.B. I.C.C. 1427) merely carried forward the provisions cancelling the two routes that were provided in the original tariffs.

If the Commission had not made its decision of March 19, 1957, requiring cancellation of the proposed cancellation of the Georgia R.R. and A. C. L. bridge routes, the tariffs under suspension would have gone into effect under the provisions of section 15(7) of the act prohibiting suspension of a tariff "for a longer period than seven months beyond the time when it [the tariff] would otherwise go into effect". The Court in setting aside the Commission's order left the Commission in the position of not legally requiring the cancellation of the two bridge routes and of properly treating Southern as if such requirement had not been made.

The effect of the Commission's action in entering its order of March 23, 1959, was merely to provide that the *status quo* should be maintained pending final determination by the Commission after further hearing. It acted entirely reasonably and in accord with the statute.

The District Court, in upholding the report and order here under consideration and in rejecting the procedural contention of appellants, appropriately said (J. S. App. p. 20):

> "And on remand it was proper for the Commission to vacate its prior order cancelling the closing of the Coast Line and Georgia Railroad routes by Southern. The status quo did not require continuing the order of cancellation in effect in view of the decision of this court that Southern had established a prima facie case. Plaintiffs tie this action to the denial of their application to the Suspension Board of the Commission to suspend the cancellation and claim prejudice, *but prejudice cannot be based on what was lawful action in every respect.*" (Emphasis supplied)

There was clearly no procedural error.[15]

CONCLUSION

The Commission's order here under attack "carries a presumption of validity" (*Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 512 (1944)). There has "been no prejudicial departure from requirements of the law or abuse of the Commission's

[15] The procedural contention as to the order of March 23, 1959, is an exigent and sterile afterthought. Examination of the petition for reconsideration filed by plaintiffs before the Commission fails to indicate that any such claim was made before the Commission and it is, therefore, too late as well as lacking in merit (See *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33).

discretion" (*United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515 (1946)). There has been no lack of necessary findings showing "the essential basis of its judgment" (*Alabama Great Southern R. Co.* v. *United States*, 340 U. S. 216, 228 (1951)), and the order is fully supported by "substantial evidence" in the record (*Universal Camera Corp.* v. *National Labor Rel. Bd.*, 340 U. S. 474, 488). Appellants have had a full and fair hearing.

Appellees therefore respectfully submit that the decision of the Court below and the Commission's order which it upholds are clearly correct; that this case presents no substantial question; and that the judgment of the District Court should be affirmed.

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Certificate of Service

I hereby certify that on the 10th day of August, 1962, I mailed, postage prepaid, a copy of the foregoing motion to all parties of record at the addresses listed below:

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